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No. 276. 42

Br. of Johnson & Bailey

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed April 21, 1900.

LOUIS LOEB,

Plaintiff in Error,

No. 276.] versus

THE TRUSTEES OF COLUMBIA TOWNSHIP, HAMILTON COUNTY, OHIO,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Brief for Defendants in Error.

WALLACE BURCH,
SIMEON M. JOHNSON,
OLIVER G. BAILEY,
Attorneys for Defendants in Error.

THE COURT INDEX PRESS.

(No. 17385).

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The act of March 3, 1891, (C. 517, Sec. 5; 26 Stat. 827, 828), so far as pertinent to this discussion provides—

"That appeals or writs of error may be taken . . . . from the existing Circuit Courts direct to the Supreme Court in the following cases . . . . in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The plaintiff, in his complaint, did not claim that any law of the state of Ohio was in contravention of the Constitution of the United States, but simply alleged that he was "a citizen of the state of Indiana, and the defendant a corporation organized under the laws of the state of Ohio

. . . . and a citizen of said state of Ohio," thus showing that the Circuit Court had jurisdiction of the case only by reason of the fact that the parties were citizens of different states.

The action was one at common law, there being claimed in the petition the sum of $2,575, with interest thereon at six (6%) per cent. from September 29, 1896. This petition contained ten causes of action, to each of which a demurrer was interposed, upon the *sole* ground that it did not state facts sufficient to constitute a cause of action against the defendants. The following is the language of the demurrer:

"Now comes the defendant and demurs to the several causes of action in the petition of plaintiff herein, for the reason that the same do not state facts sufficient to constitute a cause of action against this defendant."

This demurrer was sustained, and the plaintiff not asking to plead further, the Court proceeded to render judgment. We give the record entry:

"This cause coming on to be heard upon the demurrer of the defendants herein to the petition, having been argued by counsel, and the court being fully advised in the premises, upon consideration whereof, find that said demurrer is well taken, and sustains the same.

"And thereupon the plaintiff not asking to plead further, the court finds that the plaintiff hath no cause of action nor claim in the premises, and it is ordered by the court that the defendants go hence without day and recover from the plaintiff their costs herein expended; to all of which the plaintiff excepts."

From the above excerpts from the record we can see that the jurisdiction of the Circuit Court, as disclosed in the petition, *was dependent entirely upon the opposite parties to the suit in controversy being citizens of different states*, and that the Circuit Court of Appeals alone would have full authority to review the decision, and that its judgment would be final. (26 Stat., 826, C. 517, Sec. 6).

Nor can it make any difference that another *ground* of jurisdiction not appearing in the petition, sufficient of itself if disclosed therein to authorize a writ of error direct from the Circuit Court to this Court, was developed in the course of the proceedings.

See Ex parte Jones, 164 U. S., 691, 693, where the Court say:

"As the bill was filed after the act of 1888 took effect it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Circuit Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship."

And this court denied a petition for an order to show cause why a writ of mandamus should not issue to the Circuit Court of Appeals for the First Circuit to allow an appeal to this court from a decree of that court affirming a decree of the Circuit Court for the District of Massachusetts.

In *Borgmeyer, Administrator*, v. *Idler*, 159 U. S., 408, 414, it was said:

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court the writ of error could not have been entertained."

Is therefore the present case one provided for in Section 5 of the Act of March 3, 1891 (26 Stat., 826, 7).

Is it one in which the law of a state is *claimed* to be in contravention of the Constitution of the United States?

Does the record so show?

Opposing counsel admit that there is nothing which, in *express* terms, appears upon the face of the petition, or the

demurrer or the judgment to show that any question was involved entitling plaintiff in error to take a writ of error to this Court. But that the point *appears* in the *decision* of the District Judge sitting in the Circuit Court.

The record of any common law case in Ohio consists of the pleadings and the docket and journal entries, and so it is in the case at bar, we have only the above as properly constituting the record in the printed book. It is true we find therein the opinion of the Judge filed in the case; but this because Rule 8, Sec. 2, of this Court requires it, and we have the direct holding in *England* v. *Gebhart*, 112 U. S., 502, that—

"The opinion in the Court below when transmitted with the record in accordance with Rule 8, Sec. 2, is no part of the record."

This Court saying at page 506:

"Neither is the opinion of the Court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion to be annexed to and transmitted with the record, on a writ of error or an appeal to this Court, but that of itself does not make it part of the the record below."

It is equally true that an assignment of errors is made which aims to import this Federal question into the cause which the *record* does not show was raised in the Court below, and ruling is asked thereon so as to give this Court jurisdiction. That this can not be done was held in *Ausbro* v. *United States*, 159 U. S., 695, 698.

The opinion of Judge Thompson (attached to, but not forming part of the record) is certainly a luminous exposition of the law; but are the rights of either party to a writ of error to be concluded by that opinion? If, as must be admitted, the demurrer attacks the petition on any ground which may be argued under the reasons assigned, to-wit, "that the petition does not state facts sufficient to constitute a cause of action," may not the petition on its face disclose an unanswerable argument why it is fatally defective, and

for a reason not assigned in the opinion given? In other words, the Judge may decide the case on a point not really tenable, ignoring a good point, or may come to a correct conclusion, assigning the wrong reasons.

Take the case at bar, the petition on its face discloses that plaintiff's several causes of action are to recover the contents of choses in action. The Act of March 3, 1887, (Sec. 1, 24 U. S., at Large, Ch. 375, p. 552), provides:

"No Circuit Court of the United States has cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made."

There is no averment in this petition that Louis Loeb or plaintiff is the original holder, and not an assignee or subsequent holder of the instruments sued on, and if said plaintiff holds such instruments as assignee or subsequent holder, and the petition discloses that the same were not made by a corporation, then averments should have been made in the pleading showing the diverse citizenship of the original holder and the defendant.

It is true it is averred in the petition that the Trustees of Columbia Township of Hamilton County, Ohio, *is* a corporation organized under the laws of the state of Ohio, etc., but this averment is a mere conclusion of law, and the Court below was bound to take judicial notice of the laws of the state of Ohio, particularly of such of those laws as related to the organization of a municipal and local subdivision of the state.

It is familiar law that a township is a mere subdivision of the state for political purposes, and is not in any sense a corporation.

In *The State* v. *Powers*, 38 O. S., 54, at 62, the Supreme Court of Ohio say:

"On the other hand, school districts are constituted so as to partake rather of the character of counties and townships, which are provided for in the 10th Article of the Constitution, not as corporations, but as mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws. *Hunter* v. *Mercer County*, 10 Ohio St., 515; *State* v. *Cincinnati*, 20 Ohio St., 18,)and at bot. p. 37). In this article reference is made to 'similar boards' in connection with the commissioners of counties and trustees of townships.

"It is quite obvious, therefore, that county and township organizations, although *quasi* corporations, are not within the meaning of this provision of the Constitution."

Judge Taft, in *Brattleboro Sav. Bk.* v. *Board of Trustees of Hardy Tp., Holmes Co., Ohio*, 98 Fed. Rep., 524, held as follows:

"A township in Ohio is not a corporation, within the meaning of the state Constitution; and Article 13, Section 1, of such Constitution, providing that the Legislature shall pass no special act conferring corporate powers, does not render invalid an act authorizing a township to issue bonds."

And further in the course of his opinion said, in effect, that the power to issue bonds and borrow money, when conferred upon township trustees, was not a corporate power, using the following language. (*Ibid*, pp. 528–9).

"The opinion of Judge Scribner in delivering the opinion of the Circuit Court of Huron County in the case of *Eckstein* v. *Board*, 10 Ohio Cir. Ct. R., 480, 490, expressing the view that an act conferring upon the authorities of the Chicago Junction village school district power to borrow money and issue bonds is a special act conferring corporate power, within the Ohio Constitution, can not, in view of the cases already cited, be regarded as an authoritative exposition of this constitutional limitation. It seems to be held by the Court, through the learned Judge, that the power to issue bonds and borrow money is a corporate power, upon whomsoever it may be conferred, and therefore that, if conferred upon a school district, it is within the constitutional restriction. In this view I can not concur. There is no

reason why a natural person may not issue bonds and secure them by mortgage. The power thus exercised is not corporate, therefore, except when it is conferred upon a corporation; and it is not corporate, within the Ohio Constitution, except when it is conferred upon a corporation such as that instrument contemplated in the inhibition."

If the above be good law then the objection here urged might be raised by demurrer.

Holmes v. *Goldsmith Co.*, 147 U. S., 150.

And the demurrer in the case at bar was properly sustained, for the reasons just discussed, and not because of any claim in the record that the law under which the bonds were issued was in contravention of the Constitution of the United States. In other words, it never became legally necessary for defendants below to make such a claim or that the Court should pass upon it, if they did.

Nor does such a claim come into the case, because the Court assigns wrong reasons for its correct conclusion in sustaining the demurrer, and rendering judgment for the defendants.

The record entries of the Court's action in this respect are all important. Its reasons assigned in any opinion, unimportant.

If we be correct in the foregoing conclusions, then no writ of error could be taken direct to the Supreme Court from the judgment of the Circuit Court, for there was no case presented by the record or decided by the Court in which a law of the state of Ohio was held or claimed to be in contravention of the Constitution of the United States.

But there is another way of coming to the same conclusion. Suppose the Court had rendered no opinion, and the record was in all respects as it is now; or suppose that without an opinion the Court had overruled the demurrer and the defendants not desiring to plead further, the Court had rendered judgment in favor of the plaintiff. Could it

be said in either case that a Federal question was raised or claimed upon the record? Must there not be some distinct asseveration of this claim, by apt words, either in the pleadings, or carried into the judgment of the Court, as entered upon the record? Must not the plaintiff state in his petition, if he intends to give the Court jurisdiction on this ground, that the law of the state contravenes the United States Constitution, and the defendant likewise if he hopes to demur or plead to the action successfully, must he not, too, as ground for his demurrer or in order to set up a sufficient answer state in his pleading that the law of the state which he resists is in contravention of the United States Constitution? If this is not required of him, if the judgment of the Court speaks not by the record, or, in other words, if the reason for that judgment does not appear in the record, then the whole matter is left to conjecture, and no Court can tell whether a Federal question is really passed upon or not.

There is a grave question of doubt in this case, and presented on the record here, whether a writ of error could be sued out from any Court to reverse the judgment of the Circuit Court. There was, in legal effect, a trial by the Court, because plaintiff did not desire to plead farther after demurrer; there was no written stipulation waiving a jury, and without such stipulation, if the Court tries the cause and renders judgment, there is no right of review in the Supreme Court on any question of law arising in the case.

Kearney v. *Case*, 12 Wall., 275.
Desty's Federal Procedure, 9th Ed., Sec. 116.

While we admit that the jurisdiction of this Court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the Court below, that is, whether the Court found for or against such a claim, yet we do insist that the Federal question must appear in the record (either

in the pleadings or in the judgment entry), or such decision must have been so necessarily involved in the case that the case could not have been determined, without deciding such question.

In the latest decision upon this question, *Telluried Power Transmission Co.* v. *Rio Grande Western Railway Co.*, 20 Sup. Ct. Rep, 245, at p. 248 the Court say:

"If it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States, and the question was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms set up and claimed in the record is not conclusive against a review of the question here."

As we have already shown herein, it does not in the present case sufficiently appear from the record that the validity of a state statute was drawn in question, or that the question was decided or that such decision was necessarily involved in the case, or that the case could not have been determined without deciding such question; on the contrary, the case could have been and should have been determined without deciding such question by sustaining the demurrer on the grounds as heretofore set forth herein.

Neither the argument of counsel nor the opinion of the Court below can be looked to for the purpose of deciding whether this Court has jurisdiction.

Gibson v. *Chouteau*, 8 Wall., 314.

Nor will jurisdiction be entertained by this Court if the judgment below may have been given on grounds on which error could not have been directly prosecuted to this Court.

Steines v. *Franklin Co.*, 14 Wall., 15.

We believe that under Sec. 5 of the Act of March 3d, 1891 (26 Stat., 827, 828), the Federal question in the case

should be, with possibly some rare exceptions, specially set up or claimed to give this Court jurisdiction.

Water Power Co. v. *Street Ry. Co* , 172 U. S., 475, 488.
Spies v. *Illinois*, 123 U. S., 131, 181.
Oxley Stave Co. v. *Butler Co.*, 166 U. S., 648.

In short, we insist that when in any case the Constitution or law of a state is claimed to be in contravention to the Constitution or law of the United States, such Federal question must be raised and presented by the record precisely as like questions are presented under Sec. 709, Rev. Stat. U. S.—that is, the Federal question must be specially set up or claimed at the proper time and in the proper way.

Columbia Water Power Co. v. *Street Ry. Co.*, 172 U. S. 475, 488, and cases there cited.
Desty's Federal Procedure, 9th Ed., Sec. 223, p. 770.

And the rights to set up must have been denied, either expressly or by necessary implication.

Water Power Co. v. *Street Ry. Co.*, 172 U. S., 475, 488, and cases there cited.
Desty's Federal Procedure, 9th Ed., Sec. 223, p. 770.
Scudder v. *Comp. of New York*, 175 U. S., 32, 36.
Allen v. *Southern Pac. R. R. Co.*, 173 U. S., 479, 488.

It is always in order to raise the question of jurisdiction, and the Court, when the same is presented in whatever form, must always consider it. We ask the Court on the record here presented to dismiss the within proceeding for want of jurisdiction, because there is not disclosed thereby any Federal question as presented, or if it were presented, because the Court's decision may be properly rested upon grounds wholly independent thereof, and which grounds are entirely adequate to sustain the judgment rendered by the Court without considering any Federal question at all.

The entire argument on the question of this Court's jurisdiction is of course to no effect if the Court should grant the plaintiff's application now pending herein for a writ of *certiorari* to the Circuit Court of Appeals of the Sixth Circuit, in a cause bearing the same title therein, but as we can not in any manner anticipate the Court's determination thereon, we submit our views on the question of jurisdiction to be considered by the Court should the ruling on the application for *certiorari* leave the same still open.

II.

Inasmuch as it is claimed that this case was decided by the Court below, on the ground that Section 3 of the act in question, known as the Williams Avenue Act (90 Ohio Local Laws, 251–2), was in violation of the 14th Amendment of the Constitution of the United States, it should be stated that this Section 3 provided that "the trustees shall receive reasonable compensation for their services, which—*with all costs and expenses of constructing said improvement*, together with the interest on any bonds issued by the trustees for the same, shall be *levied and assessed upon each front foot* of the lots and lands on each side of said Williams avenue and between the termini mentioned in Section 1 hereof."

It is also to be noted that the act in question is mandatory, allowing no discretion to the Township Trustees as to the making of the proposed improvement, nor as to the assessment of the cost and expenses provided for by Section 3.

It is also to be borne in mind that each of the bonds sued on specifically refers to the act under which it was issued, as the authority for its existence, so that no question of estoppel by recitals can arise.

We most strongly controvert the statement of plaintiff in error that "to uphold the act with the special assessment

eliminated will do justice—and to invalidate it on the other hand will work injustice." The Legislature attempted to impose an imperative duty upon the township officers without any benefit to the township, the fact that the total cost was to be assessed *upon the abutting property* shows a determination by the Legislature that the act would not benefit the township as a whole. For the purpose of financing the project, an attempt was made under the act to impose upon the township a liability to be fully repaid by the abutting property owners. The township was virtually compelled to lend its credit to those for whose benefit the statute was supposed to be passed, though without opportunity on its part to make any showing as to the benefits. Under the general laws of the state, the township would not have had to pay any part of the expenses unless the Trustees found the proposed improvement would be beneficial to the township, and of their own volition imposed a part or the whole of the cost upon the township.

Section 4677, R. S. O.

The method of recoupment provided for in this statute being unconstitutional, the township, if plaintiff in error's contention be correct, will be compelled to pay the entire cost of an improvement not designed or intended by the Legislature for the benefit of the township as such; and as already stated, these bonds carry notice of their invalidity on their face.

Plaintiff in error's statement that a contractual obligation arises out of the authority to issue the bonds is irrelevant to this case and an evasion of the true issue, which is, "whether there was any authority to issue the bonds." The authority to issue the bonds is found only in the special act in question. That act (as counsel for plaintiff in error admit for the purpose of this argument) is unconstitutional as to one of its features.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no offense; it is in legal contemplation as inoperative as though it had never been passed."

Field, J., in *Norton* v. *Shelby Co.*, 118 U. S., 442.

"Bonds issued by a municipal corporation, but not under either general authority to borrow for corporate purposes or special legislative authority to borrow for purposes *within the power of the Legislature to confer*, are void in the hands of a person who is not an innocent *bona fide* holder without notice."

Ottowa v. *Carey*, 108 U. S., 110.

The defect here not being in the proceedings of the trustees as in the cases cited by plaintiff in error, but arising from a lack of power of the Legislature to authorize what was attempted to be done, cases cited as to contractual obligations issued by officials, under constitutional laws, where the assessments failed because of irregularity in the proceedings, are not pertinent to this discussion.

It appears by the third paragraph of the syllabus in *State* v. *Commissioners*, 37 O. S., 526, that the decision is placed upon the ground "that the purchaser of bonds who has no actual knowledge of defects in their execution is not bound to look beyond the finding and record of the commissioners for the purpose of ascertaining whether conditions precedent to their execution have been performed."

The situation is radically different where the act on which all the proceedings rest is invalid for constitutional reasons.

Plaintiff in error, however, claims that, omitting Section 3, enough remains of the act in question to authorize and require the Trustees to issue the bonds and thereby bind the township. There is no doubt in some cases part of a statute may be eliminated, because unconstitutional, and the remaining sections stand; but the question which arises in such a case is not whether the Legislature *could*

have enacted such a statute, but whether it *would* have done so had it foreseen that such parts of the statute would be declared unconstitutional.

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional though another be declared inoperative and void because unconstitutional, but these are cases where the parts are so distinctly separable that each can stand alone, and when the Court is able to see and declare that the intention of the Legislature was that the part pronounced valid should be enforceable even though the other part should be void. To hold otherwise would be to substitute for the law intended by the Legislature one which they may never have been willing to enact by itself."

Matthews, J., in *Poindexter* v. *Greenhow*, 114 U. S., 304, cited and approved in *Pollock* v. *the Farmers' Loan & Trust Company*, 115 U. S., 601, 635.

"Where one part of the statute is unconstitutional, that fact does not authorize the Courts to declare the remainder void also, unless all the provision are: First, connected in subject matter; second, depending upon each other; third, operating together for the same purpose, or, fourth, otherwise so connected together in meaning that it must be presumed that the Legislature would not have passed the one without the other."

Cooley's Constitutional Limitations, 211.
Commonwealth v. *Hitchings*, 5 Gray, 480.
Warren v. *Charlestown*, 2 Gray, 84.

As is well pointed out by Judge Thompson, in *Loeb* v. *Trustees Columbia Tp.*, 91 Federal Rep., 37, the sections in question are connected in subject matter—such provisions having generally been associated together in both general and special laws on the subject of local improvements. We therefore claim that they were intended to operate together for this purpose *here*, viz., to construct Williams avenue at the sole expense of the abutting property owners, and such being the purpose it is beyond reason to suppose the Legislature would have passed the act omitting

the third section, whereby the cost would have been thrown wholly, and at once, upon the township.

In this connection we wish also to cite:

Martin v. *Tyler*, 4 North Dakota, 278,

where the Court say, in effect, the fact that the Legislature has directed the cost to be assessed upon the property supposed to be benefited by the improvement, *is a determination that the county or other political subdivision is not benefited thereby.* "This determination is final. In this case, by placing the benefits and burdens elsewhere, the Legislature has declared that the county, *quoad hoc*, is not benefited. The whole burden is thrown upon other corporations and persons. The obligation rests entirely upon them and they are never relieved. All the county can do, is to obtain for them an extension of time of payment by the loan of its credit."

It is sufficient to say that the purpose of this act was to provide a highway, should not this be qualified by the clause—"the expense thereof to be paid by the abutting property owners?" Otherwise, why enact a special law? There were general laws under which the road could have been established, if the township trustees considered it of sufficient public importance so to do. (See Section 4677 Revised Statutes of Ohio). The provisions of the act in question placing the burden of the work to be done on the trustees and authorizing the raising of money, impose such duties upon them solely as a matter of convenience. If there had been a direct mode of compelling the owners to improve the highway, the township would not have appeared in the matter; but it was deemed convenient to make use of existing officials in order to raise money to pay abutting property owners for land taken, and so to do before assessing back upon them the cost and expense of the improvement. The purpose of the Legislature to fix

this cost eventually upon the abutting property owners was clear. The assessment of such cost and expense upon the abutting property owners is always one of the most important features of such legislation, and it would be difficult to say that the Legislature would have been willing to enact a law without such provisions as to this burden. Can it, therefore, be said that the Legislature would have enacted a law whereby the total cost of such improvement would have been placed upon the township in the first instance?

"It must be obvious in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder, that are allowable in support of the complete act, where some cause of invalidity is suggested to the whole of it. In the latter case we know the Legislature designed the whole act to have effect and we should sustain it if possible; in the former we do not know that the Legislature would have been willing that a part of the act should be sustained if the remainder were held void and *there is generally a presumption to the contrary*. While, therefore, in one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest that the portion not opposed to the Constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part that was void."

Angell's Note to Cooley's Constitutional Limitations, p. 212.

As to this feature we submit that the imposition of the cost upon the abutting property owners was an essential and integral part of the purpose of the act in question, and that without this feature the act would not have been passed. Whether the sale of the bonds preceded or followed the levy of assessment is immaterial.

Passing for the present the question whether or not the clearly defined intention of the Legislature, to fix the cost of the improvement of the abutting property is an integral part of the purpose of the act, we find on page seven (7) of the

brief of counsel for plaintiff in error the following admission, which we believe is fatal to the contention that the act can be severed, "the object of the assessment was to provide a fund to *reimburse* the township for expenditures or to liquidate a liability which had been incurred." In other words, it is admitted by opposing counsel that this third section of the act was at least intended as a compensation or consideration for the liability sought to be imposed upon the township. This view of the case we respectfully urge is fatal to the claim that the balance of the act can be sustained regardless of this provision for "a whole act must be declared invalid when it is apparent from an inspection of it that certain invalid portions formed the inducement or consideration for its passage."

Trumble v. *Trumble*, 37 Nebraska, 340.
Low v. *Rees Printing Company*, 41 Nebraska, 217.

"Where the void portions of a statute were evidently intended as compensation for or inducements to the valid portions thereof so that the whole taken together warrant the belief that the Legislature would not have passed the valid portions alone, the whole should be held invalid."

Walsh v. *Dousman*, 28 Wis., 541.

And if the different parts of a statute "are so materially connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant the belief that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

Shaw, C. J., in *Warren* v. *Charleston*, 2 Gray, 84, cited and approved in *Pollock* v. *Farmers' Loan & Trust Company*, 158 U. S., 601, 635.

In *Slauson* v. *Racine*, 13 Wis., 398, the first section of the act in question provided that certain tracts and land be annexed to the city of Racine. The second defined the

boundaries and provided that the farming and agricultural lands should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of six per cent. This exemption being unconstitutional, it was held that the entire act fell. The Court says (page 451):

"The provision was clearly intended as a compensation for the annexation, and stronger language could not well be selected to show that the Legislature intended the one to be subject to the conditions stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso."

In *Tate* v. *Parkland*, 11 Ky. Law Reporter, 838, it was held that where a statute enlarged the limits of a town and provided for the appointment of trustees with power to improve and grade streets, issue bonds and levy and collect a tax on all property in the town, liable for state taxes; and this tax was unconstitutional as to agricultural lands so annexed to said town, then the entire act failed, the Court saying "to enforce the collection of taxes (*i. e.*, against non-agricultural property) would impose a burden on those residing within the limits of Parkland greatly more than and different from what it was intended by the act they should bear. For, as said, the intention was to impose the burden upon all and as much of the property has been released, the entire act in reference to the issue of the bonds must fail."

And where, under the same law, a tax was levied to pay the bonds issued thereunder, the levy of the tax was enjoined on the ground that the exemption by the Constitution of the farming lands from taxation rendered the whole act invalid, as "it could not be presumed that it was the legislative intent that the actual town should bear the whole burden."

"The Legislature never intended that the measure of the liability upon the taxpayers should be determined by the extent to which the act should be held constitutional."

Parkland v. *Gaines*, 11 Ky. Law Reporter, 64.

The Supreme Court of Ohio, in *Root* v. *Board of Education*, 52 O. S., 589, has adopted this rule. In that case the statute in question provided in its first section that all *bona fide* residents in a county containing a city of the first grade, first class, should be admitted to the high schools of such city on the same terms as its residents. The second section provided for the levy of a tax to pay the expense of such high school. In an action in mandamus to compel the admission of a non-resident pupil to the city high school, it was held that the second section of the act was unconstitutional, the tax not being uniform, and therefore the entire act fell. The Court say (all concurring) :

"This is not a case in which the invalid portion of the law may be rejected without affecting the entire statute. The provisions of the first and second sections are dependent. We can not assume that the Legislature would have authorized the children of non-residents to attend the high school of that particular city without the provision as to taxation contained in the section. The invalidity of this section renders the entire act invalid." (Page 599).

See, also :

State v. *Perry*, 5 O. S., 497.

It is not irrelevant to consider other legislation on the same subject matter, and we submit that there is no better test for determining whether the Legislature would have passed an act omitting the assessment feature, than its policy for the past twenty years.

Under the general law the Trustees were not compelled to pay for any road unless they deemed it of sufficient importance to the public ; the fact that the Legislature directed the cost to be assessed upon the abutting property owners is a determination that the township was not benefited.

Martin v. *Tyler*, *supra*.

The Legislature sought to impose a liability on the Trustees and attempted to make compensation for such lia-

bility. There is therefore no room for a presumption that the act would have been passed if the Legislature had known or contemplated that this provision for compensation would fail because unconstitutional.

In *Skagit County* v. *Stites*, 10 Washington, 388, the act in question provided for: 1st, the securing of the right of way for the construction of public improvement, viz., drainage ditches; 2d, the construction of the ditches; and, 3d, the apportionment of benefits and assesssment of cost on property benefited.

The first section, *i. e.*, which provided for securing the right of way, was held unconstitutional, and therefore in an action by the county against a property owner to enforce the assessment provided for in the third section, it was held that the entire act failed and the loss was thrown upon the contractor for the work.

The Court say:

"The fact that there is a *possibility* of constructing a ditch under the remaining portions of this act is not sufficient to except it from the presumption that the Legislature would not have passed the parts of the act in question as independent provisions without conferring upon the county the right to condemn the lands for the right of way, and that part being unconstitutional, the whole act must fall."

A Minnesota statute cut off the mortgagee's remedy of foreclosure and at the same time abolished the right of a judgment creditor to redeem property upon foreclosure by a prior lien-holder. The first section was held unconstitutional as to mortgages previously executed, and it was therefore held that the clause abolishing the right to redeem fell also.

"Where an act of the Legislature is void for unconstitutionality, and some of its provisions standing alone would be unobjectionable, the latter will fall with the former if the provisions are so mutually dependent or connected with each other either as conditions, considerations or compensations for each other as to warrant the belief that the Leg-

islature intended them as a whole and would not have passed any if all could not stand."

O'Brien v. *Kruez*, 36 Minnesota, 136.

"A scheme for adding territory to a city embodied in several statutes passed cotemporaneously, providing among other things for sewers and water works, and which would not have been passed had not a provision been inserted exempting the added territory from taxation of a certain kind for a certain period, must go down if the provision for exemption is found to be unconstitutional.

"Where a single statute or several statutes constituting one scheme contain one or more unconstitutional proceedings, the obnoxious provisions will be eliminated and the statute or scheme sustained, unless the provisions are deemed so essential and are so interwoven with the others that it can not be reasonably presumed that the Legislature intended the statute to operate otherwise than as a whole, and in that event the entire statute or scheme fails."

Jones v. *Memphis*, 101 Tennessee, 188.

In the above case the issue of bonds under the act was enjoined.

Where a statute provided for the erection of levees, and the assessment of taxes to pay the expense, and it was held that the levy of a tax on land alone, omitting personalty in a certain levee district and excepting land under water, violated the constitutional requirement that all property, real, personal and mixed, should be taxed, the whole act was held void.

Reelfoot Lake Levee District v. *Dawson*, 97 Tennessee, 151.

And in *State* v. *Godwin*, 123 N. C., 697, it was said that the whole act appeared on its face to be one common scheme for working the public roads of Hertford county, and that the enforcement of its provisions depended wholly upon the tax provided for in the first section, which tax was unconstitutional because it disregarded the equation of taxation between property and poll taxes, and therefore, the entire act fell.

In case of *Martin* v. *Tyler*, 4 N. Dakota, 278, the construction of a drain, enforcements of the assessment, the payment of a drainage warrant issued for lands taken, and the issue of bonds were all enjoined. The Court say, "under Section 14, Article I of the Constitution of North Dakota," which reads: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury unless a jury be waived," private property can not be taken for public use without just compensation in money being first made to or paid into Court for the owner, even though it is sought to be taken by municipal corporation.

Since the act failed to provide compensation as required by the Constitution, the power of eminent domain could not be exercised under the statute and shorn of the provisions relating to the right of eminent domain, the statute become so incomplete and ineffectual that we can not presume that the Legislature would have passed it thus.

As to the statement of opposing counsel that the presumption of validity attaches to every part of the statute, we respectfully refer to Angell's note to Cooley Constitutional Limitations, *supra*.

We insist that the intention of the Legislature was not only to cause the improvement to be made, *but to cause it to be made at the expense of the owners of property abutting on the improvement*, and that the liability attempted to be imposed upon the township was but a means to this end; further, even adopting the argument of opposing counsel that the assessment provision was intended merely to reim-

burse the township, still this compensatory provision having failed because of lack of power in the Legislature to enact it, *it can not be presumed that the Legislature would have imposed or attempted to impose this liability without providing such compensation.*

III.

Section 3 of the act in question prescribed the same arbitrary mode of assessment as that held to be unconstitutional in *Norwood* v *Baker*. It provides exclusively for an assessment without regard to benefits.

There is no distinction in meaning, as claimed by opposing counsel, between the words "upon *each* front foot" and "by the front foot." It is not competent for a Court to sustain an assessment made upon an arbitrary and unconstitutional basis even to the extent of actual benefits conferred.

This section three (3) being an essential part of the law, any one affected by its unconstitutionality can raise the objection—the assessment is void in toto and not merely so far as it may be shown to exceed the benefits—there can be no re-assessment under this act.

In the present case the Legislature, in a special local act, without knowledge as to the benefits to be derived, declares that the total cost of improvement, including the compensation to the trustees, shall be assessed "upon each front foot" of the abutting property.

Does this language leave any room for a presumption that the Legislature had in view or considered any benefits to be derived by these property owners. Was it not purely the exercise of an arbitrary power, irrespective of such benefits?

To be sure counsel attempt to draw a distinction between the term "upon each front foot" used in this act and the words "by the front foot" used in Section 2264, Revised

Statutes of Ohio, and by way of anticipation say that only by a play upon words can the two be made to appear identical. But we fail to see wherein a valid distinction can be drawn between them.

This difference in terminology, though not in meaning, may arise from the fact that the act in question is a local law corresponding rather to an assessing ordinance for a local municipal improvement made under general laws, and where the language invariably used in Ohio, so far as relates to the mode of assessment, is: "There (shall) be levied and assessed upon each front foot of the lots and lands abutting, etc." (See Coppock's New Municipal Code, page 343, as follows:

"Section 1. That to pay the costs and expenses of improving ——— street from ——— to ——— in accordance with the provisions of Ordinance No. ——, etc., there be levied and assessed *upon each front foot of the lots and lands abutting* upon the said street between the points aforesaid."

When an assessment is according to value the ordinance reads invariably as follows (Coppock's New Municipal Code, p. 343): "That there be levied and assessed *upon each dollar of the value thereof* as assessed for taxation."

And when the assessment is according to benefits the ordinance reads (Coppock's New Municipal Code, 364, note to Sec. 2281): "That there be levied and assessed upon the lots and lands described in said report several amounts as therein set forth. 'Name of owner. Number of lot or other description. Size of lot. Amount assessed.'"

So we see that the words "upon each front foot" are used, not to designate the property to be assessed, but the mode of assessment.

In *Ernst* v. *Kunkle*, 5 O. S., 520, p. 522, the statement of the case is, that the Council assessed three and fifty-eight one-hundredths ($3.58) dollars "on each front foot of the

land abutting," and this is termed in the syllabus and opinion of the Court an assessment "by the front foot."

The assessing ordinance which was construed in *Norwood* v. *Baker* assessed the amounts on "each front foot of the several lots of land bounding and abutting on Ivanhoe avenue" (172 U. S., 269, 276), and the decision of the Court was based on that ordinance. We can not find that the expression "on" or "*upon each front foot*" has been used in any instance simply to designate the lots and lands or territory to be assessed. On the contrary, it is the appropriate language to designate an assessment *by* the front foot, and we have therefore in the instant case an act providing but one mode of assessment and that one without the slightest reference to benefits, and, as Judge Thompson well says (91 Fed. Rep., 37), "all that is said in the Baker case is equally applicable to the case at bar."

In the case of *Schroeder* v. *Overman*, cited by counsel for plaintiff in error, 42 Cincinnati Weekly Law Bulletin, 296, the plaintiff contesting the assessment raised an unnecessary issue, *i. e.*, "whether or not the assessment on her particular property was in excess of the benefits," and on this issue the Circuit Court found against her in a separate finding of fact, and therefore the Supreme Court of Ohio on that ground refused to enjoin the assessment, bowing, as they say, nevertheless, to the decision of this Court (Supreme Court of the United States) in *Norwood* v. *Baker*. If our contention be correct, that there is but one mode of assessment provided for in the act in question, then the dictum in *Walsh* v. *Baron*, 42 Cincinnati Weekly Law Bulletin, 302, cited in plaintiff's brief, to the effect that a second assessment might be here made, does not apply, for the reason that Section 2290, Revised Statutes of Ohio, provides for re-assessment *only by the council of a municipal corporation*, and does not apply to an assessment made by township trustees under a special act, as in the present

case. The Williams avenue act provides for one mode of assessment only. An assessment according to benefits could only be authorized, if at all, by a new law, the constitutionality of which it is not necessary to consider here. This Court, as we understand its decision in *Norwood* v. *Baker*, frequently cited herein, held that an assessment made by the front foot, and without regard to benefits, could not be sustained, though there had not been tendered to the Village of Norwood an amount equal to such benefits; that the village having attempted an arbitrary invasion of constitutional rights, the proceedings were not even valid in part, but that the assessment as a whole should be enjoined. Hence if the dictum in *Walsh* v. *Baron, supra*, is construed to mean that an arbitrary assessment can be made by the front foot without regard to benefits, but thereafter may notwithstanding be sustained to the extent of the special benefits conferred thereby, then the decision of the Supreme Court of Ohio is in conflict with the decision of this Court in *Norwood* v. *Baker*.

Section 2283, Revised Statutes of Ohio, providing that, "so far as practicable under the provisions of *this title*, regard must be had in making special assessments to the probable benefits to the property assessed," does not and can not control the subsequent special and local act here in question not forming a part of "that title," if indeed the section is of any force with its proviso "so far as practicable." The Williams avenue act does not refer to, nor is it governed by the general statutory provisions relating to local assessments, although it is controlled by direct reference contained therein (90 Ohio Local Laws, p. 251, Sec. 2) to general statutes relating to condemnation proceedings.

If the Supreme Court of Ohio would, as our opponents say (in their Brief, page 22) "limit the amount of any assessment to the benefits conferred and so sustain and

not invalidate the act," then this Court following its own decision in *Norwood* v. *Baker* would reverse such a holding and hold as before, that the scheme of assessment having no reference to benefits, was void *in toto*, and not only so far as it could be shown in each particular instance to exceed the benefits.

The statement of counsel (Brief, page 23) referring to the case of *Norwood* v. *Baker* that "the statute under which the assessment was levied was not declared invalid, but merely the assessment," is, we think, misleading.

> "The assessment was in itself an illegal one because it rested *upon a basis* (*i. e.*, the statute) which excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only proper one."
>
> *Norwood* v. *Baker*, 172 U. S., 269, 291.

Any new assessment would necessarily rest upon some other basis than by the front foot. Such a reassessment in the present case is impossible, for, as we have already shown the provisions of the Ohio Statutes for reassessment (Rev. Stats., Ohio, 2290) relate only to assessments by municipal corporations under general laws.

The claim that an assessment, made without regard to benefits, can be sustained by showing that the benefits actually exceed the amount of the assessment, or can be limited to an amount not exceeding the benefits, was fully discussed in *Norwood* v. *Baker*, 172 U. S., 269, 290, and was rejected by this Court in the following language:

> "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show, nor offer to show by proof, that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if proof had shown an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost ex-

ceeded the benefits. We do not concur in this view, as the pleadings show the Village proceeded upon the theory justified by the words of the statute that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property irrespective of special benefits. The assessment was by the front feet and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the Village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

The Court also say (page 293) :

"The present case is not one in which, as in most cases brought to enjoin the collection of taxes or the enforcement of special assessments, it can be plainly or clearly seen from the showing made by the pleadings that a part of the amount, if not more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. In our judgment the Circuit Court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits."

Since the decision in the above case it has been followed with copious quotations in at least one State Supreme Court, viz., that of Texas in the case of *Hutcheson* v. *Storrie*, 92 Tex., 685.

In that case it appeared there was a provision in the city charter under which the assessment was made, that if for

any reason recovery upon the certificate (issued to the contractor in payment for the improvement) could not be had in accordance with the assessment on the front foot rule, a recovery might still be allowed according to the standard of benefits to the lot; but it was held that that provision did not authorize or require the defendant to enter into the question of benefits in order to defend against recovery upon the invalid assessment under the front foot rule. (Pages 697 and 698).

It is plain from the remarks of that Court on pages 693 and 697 that it does not place upon the case of *Norwood* v. *Baker* the interpretation contended for in plaintiff in error's Brief (page 23), where it is said "that the statute (the Norwood case, under which the assessment was levied) was not declared invalid," for, after stating the claim of the contractor that the property owner might have had the question of benefits investigated in that suit and the assessment reduced so as not to exceed the special benefits received, the Court say (697) that "substantially the same question was presented in the case of *Norwood* v. *Baker*, where it was contended that the party who sued to enjoin in that case should have shown that the assessment was in excess of the benefits received and that the Court should have rendered judgment for the amount the property was benefited by the improvement." The Court then quote (page 698) the language of this Court in that case as heretofore cited herein (172 U. S., 290) and say (page 698): "The quotation entirely refutes the contention made in this case and needs no argument to dispute it."

If the township, under the general laws, had voluntarily made this improvement and issued bonds to pay for it, then it should not be permitted to escape liability because of the failure of the mode of recoupment *it* had selected. But these trustees were directed by a mandatory act to assume the burden of the improvement and the liability for the cost

of the same, although in the eyes of the Legislature the improvement was not for the benefit of the township. If the fixing of the cost upon the abutting property was an integral part of the purpose of the act, then the township ought not be held responsible for the failure of the Legislature to exact a constitutional law. If, on the other hand, as our opponents contend, the assessment feature was not a part of the purpose of the law, but a collateral provision for the township's reimbursement; as the township is deprived of the means of compensation, it should not be left with the burden of the debt. Taking either view of the case it can not be presumed that the Legislature would have passed the act in question, omitting section three thereof.

Respectfully submitted,

WALLACE BURCH,
SIMEON M. JOHNSON,
OLIVER G. BAILEY,
Counsel for Defendants in Error.

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